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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BARRY BONDS, )  
 )  
Defendant. )

No. CR 07-0732-SI

**UNITED STATES' OPPOSITION TO  
DEFENDANT'S MOTION TO STRIKE  
SECTION C OF HOSKINS TAPE  
RECORDING**

Date: April 6, 2011  
Time: 8:30 a.m.  
Judge: Honorable Susan Illston

**INTRODUCTION**

The United States opposes the defendant's April 5, 2011 motion to exclude Section C of the digital recording of Greg Anderson's 2003 conversation with Steve Hoskins, in which Anderson discusses his distribution of "the clear" (THG) and "the cream" (a testosterone-epitestosterone mixture) to the defendant. The evidence admitted at trial clearly establishes that a reasonable person in Anderson's position would have believed that THG and the testosterone cream were illegal at the time of his conversation with Hoskins.

Fed. R. Evid. 804(b)(3) does not limit the evidence that THG and the testosterone cream

were illegal to testimony admitted at trial, and they were both indeed illegal. Whether a statement exposed the declarant to liability is not a foundational prerequisite for the admission of the statement, but a preliminary question as to admissibility under Fed. R. Evid. 104(a).

In any case, given that the defendant's own grand jury testimony admits that Anderson provided him with the clear (THG) and the cream (testosterone), the statements contained in Part C are trustworthy— which is the touchstone of whether a statement may be admitted under Fed. R. Evid. 804(b)(3). It may therefore be admitted under Rule 807.

## FACTS

### A. Part C of Anderson's recorded statements

The transcript of Part C of Anderson's recorded statement from 2003 is as follows:

Anderson: He's gonna be, but the whole thing is, everything I've been doing at this point, it's all undetectable.

Hoskins: Right, right.

Anderson: See, the stuff I have, we created it. You can't— you can't buy it anywhere else. You can't get it anywhere else. But you can take it the day of, pee—

Hoskins: Un huh.

Anderson: And it comes up with nothing.

Hoskins: Isn't that the same shit that Marion Jones and them were using?

Anderson: Yeah, same stuff. Same stuff that they went to the Olympics with.

Hoskins: Right, right.

Anderson: And they test them every fucking week.

Hoskins: Every week, right, right.

Anderson: So and that's why I know it works. So that's why I'm not even trippin'. So that's cool. So that's cool.

*See Gov't Exh. 20 (transcript).*

This "stuff" referenced in this portion of the conversation is THG, nicknamed the clear, and a testosterone-epitestosterone mixture, nicknamed the cream, which were undetectable in

1 2003.

2 **B. The defendant's repeated efforts to exclude Part C from evidence**

3 The defendant first moved to exclude Part C of the recording in February of 2009. *See*  
4 Docket #82. This Court ordered that Part C was admissible. *See* Docket #137.

5 In January of 2011, the defendant renewed his motion to exclude the recording. *See*  
6 Docket #196. This Court again denied the motion. *See* Docket #223.

7 At trial, on March 23, 2011, the defendant again objected to the admission of Part C into  
8 evidence. *See* 3/23/11 Tr. at 437. The Court again overruled the objection. *Id.*

9 At the close of the government's case in chief, on April 5, 2011, the defendant made the  
10 motion to strike Part C. *See* Docket #338.

11 **C. Agent Jeff Novitzky's trial testimony regarding illegality of THG and**  
12 **testosterone in 2003**

13 Agent Novitzky testified that under FDA regulations, drugs cannot be distributed without  
14 approval by the FDA. 3/22/11 Tr. at 211-12, 215. Agent Novitzky also testified that in 2002, it  
15 was illegal to distribute anabolic steroids without a valid medical prescription under Title 21 of  
16 the United States Code. *Id.* at 215.

17 During the execution of a search warrant on Anderson's residence, Agent Novitzky found  
18 injectable anabolic steroids, human growth hormone, numerous unused syringes, THG ("the  
19 clear"), testosterone ("the cream"), and various pills. *Id.* at 243, 248-49, 252-55, 271. A chemist  
20 who eventually pleaded guilty to manufacturing and distributing THG and other designer  
21 anabolic steroids was responsible for the manufacture of THG. *Id.* at 288.

22 Agent Novitzky also testified that Anderson was a personal fitness trainer. *Id.* at 226.

23 Through Agent Novitzky, Anderson's plea agreement was admitted into evidence. *Id.* at  
24 285. In the plea agreement, Anderson admitted that between December 1, 2001 and September  
25 3, 2003, he knowingly conspired to illegally distribute anabolic steroids and laundered the  
26 proceeds of his steroid-trafficking activities in order to conceal that the proceeds were the result  
27 of his illegal distribution of anabolic steroids. *Id.* Anderson specifically admitted that he  
28 distributed THG, a performance-enhancing drug, "in furtherance of the conspiracy." *Id.* Aat

286; *see* Gov't Exh. 40.

**D. Dr. Larry Bowers's trial testimony regarding illegality of THG in 2003**

Dr. Larry Bowers testified that anabolic steroids are controlled under federal law, although medical professionals or researchers may possess them if they comply with certain registration and record-keeping requirements. 3/24/11 Tr. at 598, 600. In 2003, there were anabolic steroids that were not specifically listed in Schedule III of the Controlled Substances Act. *Id.* at 680. Dr. Bowers testified that designer steroids are designed specifically to avoid detection by testing methods, and that in 2003, he was involved in the detection of THG as such a designer steroid. *Id.* at 602, 605. Dr. Bowers testified that because THG molecularly binds to the androgenic receptor, it was a muscle-building and therefore, definitionally, an anabolic steroid. *Id.* at 606-07, 681. In 2005, it was specifically added to Schedule III of the Controlled Substances Act. *Id.* at 608-09.

**E. Other athlete trial testimony regarding Anderson's distribution of THG and testosterone**

Jason Giambi testified that in late 2002, Anderson told him to stop taking Deca, an anabolic steroid, because it would come up positive in testing, and to take an undetectable substitute. 3/29/11 Tr. at 1180, 1184. Anderson supplied Jason with a shipment including testosterone, another steroid, instead. *Id.* at 1187. A second shipment contained pills and THG and the testosterone cream. *Id.* at 1188. Anderson told Jason that THG would increase his testosterone level. *Id.* at 1190. A third shipment also contained both substances. *Id.* at 1191. Anderson's communications suggested to Jason that he should be secret about the substances. *Id.* at 1193. Anderson used fake names to ship these items to Jason. *Id.* at 1195.

Jeremy Giambi testified that in 2002, Anderson provided him with performance-enhancing drugs. *Id.* at 1208. Anderson sent Jeremy human growth hormone, testosterone, and THG, which Anderson told Jeremy was an "alternative or undetectable steroid." *Id.* at 1209-11.

Marvin Bernard testified that Anderson supplied him with steroids, including Deca, between 1998 or 1999 and 2003. *Id.* at 1231. In a private conversation prior to 2003, Anderson told Bernard to use THG because it was "undetectable steroids." *Id.* at 1235-36.

**F. Dr. Don Catlin's trial testimony regarding THG**

Dr. Don Catlin testified that THG was a designer steroid that was not commercially available in 2003, and would not have been approved for administration to a human being under scientific testing protocols in the United States. 3/31/11 Tr. at 1619-20, 1624-25. He testified that it was an anabolic steroid. *Id.* at 1624.

**G. 2004 Balco indictment**

Anderson was indicted in early 2004. *See* Balco Indictment (Def. Exh. 1113). The Indictment specifically charged the distribution of the THG without a valid prescription as part of the conspiracy to distribute anabolic steroids. *Id.* at ¶ 30. It

**H. 21 C.F.R. § 1300.01**

In 2003, anabolic steroid was defined as "any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promotes muscle growth, and includes" a specific list of identified steroids. 21 C.F.R. § 1300.01.

**ARGUMENT**

**I. Trial evidence shows that Part C was a statement against Anderson's interest in Fed. R. Evid. 804(b)(3)**

As shown above, a thorough review of the trial record reveals that there is sufficient evidence to establish that Anderson's statements in 2003 about his administration of THG and testosterone were against his penal interest within the meaning of Fed. R. Evid. 803(b)(3).

Of critical importance, Anderson admitted in his plea agreement that between 2001 and 2003, he purveyed the THG and testosterone cream in furtherance of his conspiracy to distribute illegal anabolic steroids. In other words, he knew that his distribution of the clear and the cream were illegal.

Further, Dr. Bowers and Dr. Catlin both testified that, although THG was not known until late 2003, it was in fact an anabolic steroid that was not commercially available. Agent Novitzky and Dr. Bowers both testified that anabolic steroids were strictly regulated by federal law, both

1 under the Controlled Substances Act and by FDA regulation.

2 The Giambis and Bernard testified that Anderson first provided them with known  
3 anabolic steroids such as testosterone, later touted THG and the testosterone-epitestosterone  
4 cream as steroids that would be undetectable, and that he was secretive about it. Anderson's  
5 words and demeanor in Part C of the recording are consistent with this. He states that the "stuff"  
6 is not commercially available and is undetectable, and he speaks in a hushed voice.

7 The record indicates that Anderson's distribution of THG and testosterone was illegal in  
8 2003. The record supports this Court maintaining the admissibility of Part C, as it has previously  
9 done against the defendant's three nearly-identical challenges.

10 **II. Fed. R. Evid. 804(b)(3)'s foundational requirements are not requirements that must**  
11 **be established at trial**

12 Fed. R. Evid. 804(b)(3) provides for the admissibility of Part C so long as the government  
13 can show that (1) Anderson is unavailable as a witness, (2) a reasonable person in Anderson's  
14 position would have made the statements in Part C only if he believed they to be true because,  
15 when made, they exposed Anderson to civil or criminal liability, and (3) to the extent that the  
16 statements tend to expose Anderson to criminal liability, the recording is supported by  
17 corroborating circumstances. Fed. R. Evid. 804(b)(3); *see United States v. Shryock*, 342 F.3d  
18 948, 981 (9th Cir. 2003). These elements are foundational in the sense that they are  
19 prerequisites to the admission of Part C. But whether the government has met these elements is  
20 for the Court to decide under Fed. R. Evid. 104(a). These elements are not foundational in the  
21 sense that they must be established in the trial record. *See Padilla v. Terhune*, 309 F.3d 614, 620  
22 (9th Cir. 2002) (noting that trustworthiness of declarant is for court to decide, whereas credibility  
23 of witness testifying about statement remains for jury to decide). There is no requirement that  
24 the government present its evidence on these elements to the jury, and certainly the Court is not  
25 limited to what has been presented to the jury in determining the question of admissibility. The  
26 Court may therefore consider evidence outside of the trial record in determining whether  
27 Anderson reasonably should have known in 2003 that his statements about THG and testosterone  
28

1 cream exposed him to civil or criminal liability.

2 Evidence outside of the trial record should give this Court further confidence in its prior  
3 rulings that Part C is admissible. In 2003, Schedule III included the category of anabolic  
4 steroids, which was defined as “any drug or hormonal substance, chemically and  
5 pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids)  
6 that promotes muscle growth, and includes” a list of known compounds. 21 C.F.R. §§ 1300.01,  
7 1308.13. There is no question that the testosterone-epitestosterone cream is chemically and  
8 pharmacologically related to testosterone, and that Anderson knew it should be taken in  
9 conjunction with THG to mask the depletion of natural testosterone that THG caused. There is  
10 also no question that THG was an anabolic steroid and Anderson gave it to his clients to promote  
11 their muscle growth and athletic prowess.

12 **III. Part C is trustworthy because the defendant admits receiving the clear and the**  
13 **cream from Anderson, and is therefore also admissible under Rule 807**

14 Rule 804(b)(3) ultimately is concerned with whether a statement is trustworthy enough to  
15 be admitted. The fact that a declarant exposes himself to civil or criminal liability generally  
16 suggests that his statement is truthful and trustworthy. In this case, Anderson’s statements about  
17 the clear and the cream clearly exposed him to criminal liability. To the extent that what he was  
18 doing was contrary to the interests of Major League Baseball’s internal regulations, he was  
19 exposing himself potentially to civil liability too.

20 But apart from the exposure to liability, Anderson’s statements in Part C are also  
21 trustworthy because the defendant admits in his grand jury testimony that Anderson gave him the  
22 clear and the cream. Similarly, the Giambi brothers and Bernard testified that Anderson gave  
23 them the clear and the cream. These all should assure the Court that the statements in Part C are  
24 trustworthy and admissible, if not under Rule 804(b)(3), then under Rule 807, which admits  
25 statements with “equivalent circumstantial guarantees of trustworthiness,” where offered as  
26 evidence of a material fact, and is more probative on the point for which it is offered than any  
27 other evidence which the proponent can procure through reasonable efforts, and consistent with  
28 the interests of justice.

1 In this case, Part C is offered as evidence of the fact that the defendant used THG and  
2 testosterone – steroids – prior to his grand jury testimony. Given that Anderson has refused to  
3 testify at trial, his recording in Part C is highly probative evidence on that point. The interests of  
4 justice will be best served by allowing Section C of the recording to remain in evidence for the  
5 jury's consideration.

6 **CONCLUSION**

7 For the above-stated reasons, the government respectfully requests that the defendant's  
8 motion to strike Part C of the Anderson recording from 2003 be denied.

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10  
11 DATED: April 5, 2011

Respectfully submitted,

12  
13 MELINDA HAAG  
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14  
15 /s/  
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